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COURT OF CRIMINAL APPEALS
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NO. PD-1279-19

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
2/11/2020
DEANA WILLIAMSON, CLERK

RAMIRO CASTILLO-RAMIREZ,

Plaintiff-Appellant,

v.

THE STATE OF TEXAS,

Defendant-Appellee.

Appeal from Cause 16-CR-271, Starr County
And No. 04-18-00514-CR, San Antonio Court of Appeals

APPELLANT'S REPLY TO STATE'S PETITION FOR DISCRETIONARY REVIEW

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IDENTITY OF THE JUDGE, PARTIES, AND COUNSEL

- The parties to the trial court's judgement are the State of Texas and Appellant, Ramiro Castillo-Ramirez.

- The trial judge was Hon. Martin Chiuminatto, Visiting Judge, sitting for the 381st District Court, Starr County, Texas.

- Counsel for Appellant at trial was Jesus "Chuy" Alvarez, 501 N. Briton Ave., Rio Grande City, Texas 78582.

- Counsel for Appellant on appeal were Linda Gonzalez, Chief Public Defender, and Jessica Anderson, First Asst. Public Defender, Texas RioGrande Legal Aid, Inc., 310 East Mirasoles Street, Rio Grande City, Texas 78582.

- Counsel for Appellant before this Court are Linda Gonzalez, Chief Public Defender, and Jessica Anderson, First Asst. Public Defender, Texas RioGrande Legal Aid, Inc., 310 East Mirasoles Street, Rio Grande City, Texas 78582.

- Counsel for the State at trial were Gilberto Hernandez-Solano and Alexandria Barrera, Assistant District Attorneys, 401 N. Britton Ave., Starr County Courthouse, 3rd Floor, Suite 417, Rio Grande City, Texas 78582.

- Counsel for the State before the Court of Appeals were Gilberto Hernandez-Solano (original brief) and Andrew Whitlock (motion for rehearing), Assistant District Attorneys, Starr County Courthouse, 401 N. Britton Ave., Suite 417, Rio Grande City, Texas 78582.

- Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13045, Austin, Texas 78711.

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APPELLANT'S REPLY TO STATE'S PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Jury charges are essential in guiding a jury through its correct assessment of law to fact. They should be correct and not vary from the allegations in the indictment. Here, the court of appeals correctly assessed that the mistake in the jury charge for this case was egregiously harmful to the Appellant Ramiro Castillo-Ramirez and granted him a new trial. Appellant respectfully requests the State's Petition for Discretionary Review be denied.

STATEMENT REGARDING ORAL ARGUMENT

The Appellant does not request oral argument.

STATEMENT OF THE CASE

Appellant was indicted for aggravated sexual assault of an elderly individual by means of penetration of her anus "by his sexual organ." The jury charge charged the Appellant with aggravated sexual assault "by any means." Appellant raised the jury charge error on his appeal. The court of appeals held this jury charge error to be egregiously harmful and remanded the case to the trial court for a new trial.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals issued its opinion on August 21, 2019. The State filed a motion for reconsideration en banc, which was denied November 26, 2019. The State filed its Petition for Discretionary Review on January 7, 2020. Appellant was granted an extension to file its reply until February 10, 2020.

ARGUMENT

The jury charge was erroneous. The State agrees that it was erroneous. They are contesting whether the harm was egregiously harmful to the Appellant as the court of appeals has found. Here, the egregious harm of the jury charge error affected a defensive theory on the case.

The jury charge error was egregious due to it depriving the Appellant of one of its defensive theories.

In the State's first three points in it Petition for Discretionary Review, it relies on the very strong assertion that "there was no evidence, argument, or assertion that the victim was penetrated by anything other than the Appellant's penis."[1] Based on that assertion, the State claims that the jury charge error was harmless and the court of appeals simply "got the record very wrong."[2] However, the record is very clear that there were challenges to the forensic evidence presented, vague testimony from the alleged victim regarding "sexual organ," and trial counsel's statements and *arguments* during closing argument which all pointed to a defensive theory of an alternate instrumentality used other than the Appellant's sexual organ.

First, the state introduced forensic evidence in which DNA evidence matching the Appellant was recovered from the vagina of the victim and not the anus.[3] Second, in her entire testimony regarding anal penetration, the victim never used an anatomical or colloquial word for sexual organ or penis.[4] The prosecutor

[1] State's Petition for Discretionary review, p. 5 ("Petition").

[2] Petition, p. 8

[3] 5 RR 130.

[4] 3 RR 92.

used the word “penis” and never asked her to describe it or anything else.[5] Lastly, and most importantly, defense counsel incorporated these facts into a defensive theory in which he presented during closing argument. Defense counsel instructed the jury that they need to find beyond a reasonable doubt that the Appellant’s sexual organ, *not any other objects* was the cause of the penetration.[6]

There were clearly arguments and assertions made on the record that indicate as least one of the defensive theories was that penetration was by another object. Obviously other defensive theories were presented throughout the course of the trial. Including that penetration did not occur at all or that any sexual contact was consensual. However, defensive theories can be duplicitous and evolve throughout trial. They can be presented at any point, including closing argument. There was an argument made that an object other than the Appellant’s sexual organ caused the penetration of the alleged victim. This error was not completely harmless but in fact caused egregious harm to Appellant as it made one of his theories completely meaningless to the jury.

[5] 3 RR 92.

[6] 5 RR 221-22 (arguing that “it doesn’t say that I raped you by putting my finger up your butt. It doesn’t say if I put a pen up your butt. It doesn’t say none of that. It says the sexual organ of a person).

The apparent significance of the error to Appellant's Trial Counsel is irrelevant.

The State, in its Petition, speculates that because defense counsel did not make an objection to the jury charge when it was brought to everyone's attention, that it must demonstrate the error was insignificant.[7] On the contrary, Defense counsel's objection to the PowerPoint which included "by any means" demonstrates that it is significant to his theory at trial.[8] However, this point is likely irrelevant to the analysis here given that the Court is charged with determining whether egregious harm occurred based on jury charge error, and not trial counsel's thoughts on the issue. An analysis of egregious error includes the "jury charge, state of the evidence, the argument of counsel, and any other relevant information."[9] Speculation as to defense counsel's thoughts on the significance or insignificance of the inclusion into the jury charge is not relevant.

[7] Petition, p. 10.

[8] 5 RR 186 (arguing that [in reference to "by any means" in the State's closing PowerPoint] "this is not appropriate, Judge. This is not part of the indictment 'by any means,' Judge. It's not part of the charging instrument, Judge).

[9] Thomas v. State, 454 S.W.3d 660, 665 (Tex. App. Texarkana 2014).

Analysis of the entirety of the charge demonstrates the harmfulness of the error.

There are three sections of the physical jury charge which refer to the manner and means of this case. First, the "Accusation" section on page three (3), then the "Relevant Statutes" section on the top of page four (4), and lastly in the "Application of Law to Facts" section on the bottom of page four (4). The phrase "by any means" appears in the "Relevant Statutes" section, but more importantly, the "Application of Law to Facts" section does not limit the jury to the accusation of the indictment of "by any means."[10] *Only* the "Accusation" section of the charge included "by sexual organ."[11] The "Accusation" section of the jury charge appears on page three (3) of the jury charge and does not direct the jury to take any action.[12] However, the "Relevant Statute" and "Application of Law to Facts" sections both appear on page four (4) of the jury charge and gives the jury specific instructions.[13]

[10] 5 RR 199-200.

[11] 5 RR 199.

[12] 5 RR 199.

[13] 5 RR 199-200.

The "Application of Law to Facts" section is the section which directs the jury on how to make its finding and verdict.[14] This section does not limit the jury to the manner and means in the indictment. It simply asks the jury to find whether "the defendant caused the penetration of the anus."[15] It is not unreasonable to assume the jury could have considered different manners and means other than "by sexual organ." It is also not unreasonable to assume that the "Application of Law to Facts" section is the section the jurors would return for guidance on how to reach their verdict. The court of appeals was correct that there was a danger that the jurors did not agree on the means "by his sexual organ" even though it was alleged that way in the indictment.

Variance between charging instrument and jury charge resulted in egregious harm and resulted in the violation of the Appellant's rights.

This Court has, in the context of jury charge analysis, held that "[T]he indictment [is] the basis for the allegations which must be proved and … the hypothetically correct jury charge for the case must be authorized by the

[14] 5 RR 200-01 ("You must determine whether the State has proved beyond a reasonable doubt three elements. The elements that—are that: one, the Defendant in Starr County, Texas, on or about the 29th day of July of 2016 caused the penetration of the anus of Guadalupe Reyes Alvarado; two, Guadalupe Reyes Alvarado was a person 65 years of age or older; three, the penetration was without Guadalupe Reyes Alvarado's consent. If you all agree the State has failed to prove beyond a reasonable doubt one or more of the elements---correction—one or more of the elements one, two, and three listed above, you must find the defendant not guilty").

[15] 5 RR 200.

indictment."[16] This hypothetically correct jury charge must also "adequately describe the particular offense for which the defendant was tried."[17] It is evident, based on years and years of this Court's double jeopardy and jury charge jurisprudence that what the State chooses to plead in the indictment is at the crux of what a legally appropriate jury charge should look like.

In light of that, and whether a particular manner and means or instrumentality is statutory or not, what the State chose to plead in their indictment in this case is critical, decisive, and should be the main focus of the issue at hand.

In Appellant's case, the indictment only alleged penetration of the anus of the complainant by defendant's sexual organ. While the State could have chosen to draft the indictment to read, "by any means," or in a way that specified several different means, alternatively, that is not the course of action the State took in this case. Instead, the indictment was drafted in a way that specifies one single means of penetration. That is to say, the statutory language was modified by the indictment in a limiting fashion, not in an expansive fashion.

It is one thing to have an indictment that alleges multiple and/or alternate manner/means/instrumentalities, followed by a jury charge that limits or narrows

[16] Gollihar v. State, 46 S.W.3d 243, 245 (Tex. Crim. App. 2001).

[17] Malik v. State, 953 S.W.2d 234, 234–35 (Tex. Crim. App. 1997).

them down or provides specific, alternate possible ways to convict, based on the evidence presented.

It is another very different and egregiously harmful thing to have an indictment that alleges only one specific manner/means/instrumentality followed by a jury charge that does not track the indictment and which infinitely expands the possible ways to convict. This is what happened in Appellant's case.

Tex. Penal Code § 22.021 (a)(1)(A)(i)[18] describes an assaultive offense that allows for different acts to be chargeable and capable of being prosecuted as different and separate offenses. That is, if a person's anus is penetrated by instrumentality A and instrumentality B, the State could charge and prosecute an individual twice, one for each instrumentality.

Here, though the statute does not require the State to allege a specific instrumentality, allowing for penetration to be proven to have occurred by any means, the State chose to charge Appellant very specifically with penetrating the complainant's anus with Appellant's sexual organ. Importantly, the evidence at trial indicated that no DNA was found in the complainant's anus, which reasonably could have led a jury to believe that penetration did occur, but not necessarily with Appellant's sexual organ, but rather with some other, ANY other, instrumentality. The application paragraph of the jury charge in this case allowed for jurors to find

[18] Tex. Penal Code § 22.021 (a)(1)(A)(i).

Appellant guilty for penetration by a carrot, a pen, a fist, a bat, a needle, a cotton swab, etc. The list is as infinite and expansive as the jurors' imaginations. What is extremely problematic about this is that Appellant could never and will never know what the State is barred from further prosecuting him for in the future – a clear infringement upon his protections against double jeopardy.

This Court has held before that it will tolerate "little mistakes" that do not prejudice the defendant's substantial rights, but not mistakes that "amount to a failure to prove the offense alleged."[19] Appellant's substantial rights were violated in this case by having been convicted based on a jury charge that widened the realm of possibilities upon which the offense of aggravated sexual assault could have occurred that it is impossible to ever discern what degree of variance exists between what the State plead, what the proof at trial showed, and what the jury ultimately convicted the Appellant of. In other words, based on the variance between the charging instrument and the jury charge, it is extremely unclear what particular offense this man was tried for.

CONCLUSION

Appellant was egregiously harmed by jury charge error. The jury charge in his case enlarged the manner and means from which he was indicted. The variance

[19] Byrd v. State, 336 S.W.3d 242, 246-48. (Tex. Crim. App. 2011).

in the jury charge made at least one of his defensive theories meaningless to the jury. Appellant respectfully requests this Court deny intervention.

PRAYER FOR RELIEF

For the reasons set forth above, the appellant requests that this Court deny the State's Petition for Discretionary Review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 2,223 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ Jessica Anderson
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 10th day of February 2020, the Appellant's Response to the State's Petition for Discretionary Review was served electronically on the parties below.

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